UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 582

Case No. 614: NEUMAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas, on 12 August 1991, Lawrence Neuman, a former staff member of the United Nations, filed an application containing pleas that read as follows:

"II. Pleas

(1) To declare the present appeal receivable;

(2) To adjudge that the decision of summary dismissal was procedurally flawed because the letter of summary dismissal was signed by the Assistant Secretary-General for Human Resources Management instead of the Under-Secretary-General for Administration and Management contrary to paragraph 4 of ST/AI/234/Rev.1.

(3) To find that the Administration's categorization of the Applicant's use of a photocopier and voluntary activities as an 'exceptional and urgent' case which warranted summary dismissal was a flagrant abuse of discretionary authority.

(4) To adjudge and declare that the Administration ignored the intent of the General Assembly in changing the Staff Rules and circumvented the process whereby a sanction commensurate with the gravity of the misconduct could be applied.

(5) To rule that the decision of the Administration to summarily dismiss the Applicant was improperly made because the Administration ignored a prior Judgement of the Administrative Tribunal, Judgement 491, which addressed circumstances which were similar to those of the Applicant.

(6) To declare that the procedure which should have been followed in the Appellant's case would have been to refer the matter to the Joint Disciplinary Committee where he would have been given the benefit of a hearing before any further action was taken.

(7) To find that the decision to summarily dismiss the Applicant was unjustified because there was no evidence of patent misconduct and the acts with which he was charged were not such as would properly be characterized as 'serious misconduct' requiring immediate separation from service.

(8) To rule that the decision to summarily dismiss the Applicant was tainted with prejudice as the Applicant's explanations were not given any credence by the Administration.

(9) To adjudge and declare that even when allegations against the Applicant were viewed in the light least favourable to the Applicant, they did not constitute conduct so injurious to the Organization that the staff member had to be separated from it without the process due under staff rule 110.4, and that consequently the Applicant was denied due process.

(10) To find that the Applicant was treated in an arbitrary and discriminatory manner which precluded any independent determination of the facts and an assessment as to whether or not there was misconduct.

(11) To order the Respondent to pay the Applicant damages in the amount of six years of net salary, considering the exceptional seriousness of the violations committed in the present case, for violation of the terms of his permanent appointment, for lack of due process, for discrimination, for abuse of discretionary authority, for the devastating effect upon the Applicant's professional career, and for the hardship and suffering which were inflicted upon the Applicant and his family."

Whereas the Respondent filed his answer on 10 March 1992;

Whereas the Applicant filed written observations on 7 April 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 June 1973, on a short-term appointment for one month at the P-3 level, as a Scientific Affairs Officer in the Ocean Economics and Technology Branch/Resources and Transport Division of the Department of Economic and Social Affairs. He then served on a two year fixed-term appointment through 30 June 1975, that was converted to a probationary appointment with effect from 1 February 1975. He received a permanent appointment on 1 November 1975. On 1 April 1977, the Applicant was promoted to the P-4 level. Until his dismissal on 22 May 1990, the Applicant remained in the same Department and, from 1988, served in the Energy and Resources Branch of the Office for Development Research and Policy Analysis.

On 21 February 1990, the Director of the General Analysis and Policy Division wrote to the Applicant concerning his "excessive use of the photocopying machine for non-United Nations matters", which had been brought to his attention, including the "most recent instances" that had occurred on 15 and 17 February.

On 3 April 1990, the Director of the Staff Administration and Training Division, Office of Human Resources Management (OHRM), wrote to the Applicant advising him that he was charged with serious misconduct. He referred to the use of the photocopy machine and noted that some of the pages found in the copy room indicated that he was "conducting, from United Nations premises, an independent commercial activity". Also, he had listed as one of his "qualifications as President and Chief Executive Officer and Director [his] experience 'as senior officer of the United Nations (1973-present)', having 'advised on matters relating to both conventional and renewable energy.'" He further noted that:

> "In conducting a private business related to your official functions from United Nations premises, using United Nations property and facilities, you have violated a number of your duties and obligations as an international civil servant ... You did not request the prior approval of the Secretary-General before engaging in outside occupation, as required by staff rule 101.6(a), and failed to abide by the prohibition contained in staff rule 101.6(b) against staff members being actively associated with the management of any business concern if it were possible for the staff member to

> benefit from such association by reason of his or her official position with the United Nations."

The Applicant was asked "to make, within 10 working days of the receipt of this memorandum, any comments or explanations [he] may wish to offer".

In a reply dated 12 April 1990, the Applicant stated, inter alia, that the "allegations of misconduct are unfounded". He also admitted having used the photocopying facilities, denied that this activity interfered with the work of other staff members and also denied that he was conducting a private business from UN premises. He stated in this regard:

> "... I am not conducting any independent commercial activity from United Nations premises. ...
>
> As an investor in PRC [Pinnacle Resources Corporation], I was given the title of President and Director of The Pinnacle Resources Corporation on a pro bono basis. I serve in that capacity on a voluntary basis and receive no salary, remuneration or material benefit from my service in the company."

On 1 May 1990, the Assistant Secretary-General, OHRM, recommended to the Secretary-General, that the Applicant be summarily dismissed for serious misconduct on the following grounds:

> "a. ... that [the Applicant] knowingly used UN premises and property for a private purpose in violation of staff regulation 1.1...;
>
> b. ... that [the Applicant] engaged in outside activities in violation of staff regulation 1.2;
>
> c. ... that he did so without requesting prior approval as required by staff rule 101.6(a);
>
> d. ... that [the Applicant] was actively associated with the management of, or held a financial interest in, a business concern despite the existence of a possibility that he would benefit from such association or financial interest by reason of his official position with the United Nations, in violation of staff rule 101.6(b), and that he did not declare his interest in that business concern in violation of staff rule 101.6(c);"

He concluded "that such acts constitute serious misconduct" and recommended that the Applicant "be summarily dismissed for serious misconduct under staff regulation 10.2, second paragraph."

On 22 May 1990, the Assistant Secretary-General, OHRM, informed the Applicant of the Secretary-General's decision that he "be summarily dismissed for serious misconduct, in accordance with the second paragraph of United Nations staff regulation 10.2", effective as of the close of business on that date. He explained that the Secretary-General's decision was based on the grounds listed above.

In a letter dated 28 June 1990, to the Secretary of the Joint Disciplinary Committee (JDC), the Applicant requested that the decision to summarily dismiss him be reviewed by the JDC, in accordance with staff rule 110.4(c). The JDC submitted its report on 14 December 1990. Its conclusions and recommendation read as follows:

"V. Conclusions and recommendation

16. Accordingly, the Panel concludes that the procedure which was followed was not proper in the circumstances. The staff member was charged with having committed certain acts - the facts and the nature of which were in dispute. Even when these allegations were viewed in the light least favorable to the staff member, they did not constitute conduct so injurious to the Organization that the staff member had to be separated from it without the process which is due him under staff rule 110.4.

17. Instead, the procedure which should have been followed in this case would have been to refer the matter to the Joint Disciplinary Committee. There would have been the opportunity for that body to make an independent determination of the facts and to make an assessment as to whether there was misconduct in this case. If it had determined that misconduct had occurred, it then could have recommended a sanction which it considered commensurate with the gravity of the misconduct.

18. Accordingly, the Panel recommends that the appellant be reinstated, and that he be paid moral damages in an amount equal to three months' net base salary as compensation for the summary dismissal, which was improper. The Panel further recommends that if the appellant is not reinstated, he should receive payment of compensation in an amount equal to two years' net base salary, which would include moral damages."

On 14 February 1991, the Under Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in light of the JDC report, had "decided not to accept its recommendations and to maintain, therefore, the decision to summarily dismiss" him.

On 12 August 1991, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The authority to dismiss staff has not been delegated to the Assistant Secretary-General, OHRM, and therefore the decision to dismiss the Applicant was invalid.

2. The characterization of the use of a photocopier and the Applicant's voluntary activities as warranting summary dismissal was an abuse of discretionary authority.

3. The Respondent should have referred the matter to the JDC. In not doing so, he violated his own rules and procedures.

4. The decision to summarily dismiss the Applicant was tainted with prejudice.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was properly taken by the Acting Under-Secretary-General for Administration and Management on behalf of the Secretary-General. The fact that the Assistant Secretary-General for Human Resources Management communicated this decision to the Applicant did not affect its validity.

2. The Secretary-General has broad discretion with regard to disciplinary matters. This includes a determination of what constitutes serious misconduct warranting summary dismissal. The Secretary-General's decision to summarily dismiss the Applicant for his unauthorized engagement in outside activities and use of UN premises and property for private purposes, was a valid exercise of that discretionary authority. It was not vitiated by mistake of fact, lack of due process, by prejudice or by any other extraneous factors.

The Tribunal, having deliberated from 29 October to 20 November 1992, now pronounces the following judgement:

I. The Applicant has listed 11 pleas: the sum and substance of which are that the alleged facts of wrong-doing on his part did not justify summary dismissal, that the procedure followed by the Respondent in concluding that the Applicant was guilty of serious misconduct deserving summary dismissal was faulty in numerous ways and totally indefensible, that the Respondent's attitude and decision were discriminatory, and finally that the punishment inflicted was not commensurate with the offence.

II. In view of all the mistakes allegedly committed by the Respondent and the consequent injuries suffered by the Applicant, he asks for six years' net salary. Before the Joint Disciplinary Committee (JDC) the Applicant proposed, as an alternative to reinstatement, "damages in the amount of three years net salary for lack of due process, hardship and suffering".

III. The Tribunal finds it necessary to state, at the outset, that in disciplinary cases it has always held that the Secretary-General can exercise broad discretionary powers, including the power to dismiss a member of the staff for serious misconduct. The Tribunal has consistently refused to interfere with the exercise of this power by the Secretary-General, unless it can be shown to have been tainted by bias or prejudice or other extraneous factors. Furthermore, the Tribunal's jurisprudence has established that if the Secretary-General concludes, after proper examination, that a staff member's conduct is unsatisfactory, he may impose any of the disciplinary measures prescribed in staff rule 110.3.

IV. The Applicant does not question the discretionary power of the Secretary-General, as described by the Administrative Tribunal, but avers that the issue of how that authority should be exercised has been addressed. The Applicant refers to discussions in the General Assembly and elsewhere which were meant, in his view, to show how such discretionary powers should be exercised.

V. Whatever might be the nature of the discussions on this subject, the Tribunal is bound by the Staff Regulations and Rules, and neither national laws nor speculations on what the General Assembly might or might not have intended can detract from the substantive provisions of relevant Regulations and Rules. Staff rule 110.4, dealing with "due process", makes it amply clear that no advice from a JDC shall be required "in respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service". The rule further provides that, after the advice of the JDC has been received, "the Secretary-General shall decide as soon as possible what action to take in respect thereof."

VI. In this case, the assistance of the JDC was not invoked by the Respondent, but, at the request of the Applicant, a JDC was constituted. In its report dated 14 December 1990, the JDC criticized the procedure followed and stated in paragraph 17:

> "17. Instead, the procedure which should have been followed in this case would have been to refer the matter to the Joint Disciplinary Committee. There would have been the opportunity for that body to make an independent determination of the facts and to make an assessment as to whether there was misconduct in this case. If it had determined that misconduct had occurred, it then could have recommended a sanction which it considered commensurate with the gravity of the misconduct."

VII. The JDC does not offer any explanation why it did not itself "make an independent determination of the facts" and forward such recommendation as might have appeared appropriate in the circumstances. The JDC found that the allegations by the Respondent, even if they could be established as correct, were not such as to warrant immediate separation from service. The JDC was entitled to its opinion, but the Respondent, after considering the advice given to him by the JDC, maintained his decision to dismiss the Applicant summarily. The Applicant has come to the Tribunal to appeal against this decision of the Secretary-General. The JDC's recommendation is advisory, as indeed is recognized by the Applicant, when he concluded his request for the review by the JDC of his summary dismissal, dated 28 June 1990, with the following sentence:

> "In the event that the Joint Disciplinary Committee should make a unanimous recommendation upon my case, I would be most grateful if the Under-Secretary-General for Administration and Management would consider accepting that recommendation in the same way that he accepts unanimous recommendations made by the Joint Appeals Board.

VIII. A few relatively less important points may be disposed of at this stage. The case is clearly receivable and the complaint that the letter of dismissal was signed by an Assistant Secretary-General rather than by an Under-Secretary-General, need not be pursued; there is evidence that the decision was approved by the Secretary-General and the letter of dismissal of the Applicant on 22 May 1990, was endorsed by the Acting Under-Secretary-General. Similarly, the Tribunal does not consider the delay, caused by sending the JDC report to the Applicant at the wrong address, as material. The Tribunal also notes that the considerations and conclusions of the case of Murthy (Judgement No. 491), cited by the Applicant in support of his case do not apply to the present case.

IX. No evidence of bias or prejudice has been adduced, except that the Applicant asserts that the reference to two past incidents by the Respondent - one relating to medical insurance and another to tax reimbursements - are discriminatory and prejudicial. The Respondent seems to claim that these references form "background" necessary to decide the suitability of the Applicant for further service with the United Nations. The Tribunal takes the view that the totality of a staff member's record should be carefully considered by the Secretary-General before he reaches any conclusion on whether the seriousness of the misconduct warrants immediate separation from service. The Tribunal therefore finds that a study of the Applicant's record does not violate any of his contractual rights.

X. The principal contentions of the parties revolve around the incidents on 15 and 17 February, the latter being a Saturday - not a normal working day. When the Applicant was first informed on 21 February 1990, of these incidents, he kept quiet although he was told "that your abuse of office facilities for personal activities is, to say the least, highly improper" and that "secondly, I should like to call your attention to staff rule 101.6

regarding involvement of staff members in outside activities." The Tribunal finds the Applicant's silence for about seven weeks inconsistent with the total innocence he claimed on 12 April 1990, when he replied to the formal charge made against him by the Respondent on 3 April 1990. His letter of 12 April 1990, does not, moreover, make any significant comments on the abuse of office facilities.

XI. What is in dispute is not so much the volume and extent of this abuse as the nature of the material photocopied and what it purported to show, although the Applicant hints that other people besides himself or his wife could have used the photocopying room on the dates in question. On 11 April 1990, two letters were addressed to the Director, Staff Administration and Training Division, OHRM, one from a former staff member of the UN, and another from a partner in a firm of certified public accountants. The purpose of both letters was to provide evidence that the Applicant had no financial interests in the "Pinnacle Resources Corporation" for whose promotion the facilities of the United Nations were allegedly used widely by the Applicant.

XII. There has been much discussion about the nature of the Applicant's activities outside the UN, the use of his position in the UN for encouraging these activities and of whether he had any current or potential financial interests in these activities. On 1 May 1990, a detailed memorandum was sent by the Assistant Secretary-General, OHRM, to the Secretary-General, recommending summary dismissal of the Applicant. In paragraph 8 it stated:

> "All due process requirements have been respected. Mr. Neuman received a detailed statement of charges in the Allegations of Serious Misconduct he received on 6 April 1990. He was asked to comment within ten working days of receipt of the Allegations and did so on 12 April 1990. He was informed of his right to obtain the assistance of counsel. The misconduct is serious and patent; the facts are established and there is no need to refer the matter to a Joint Disciplinary Committee."

XIII. A careful reading of the memorandum and of the submissions, together with the comments later made by the Applicant at different stages, convinces the Tribunal that, in the present case, the Secretary-General properly exercised his broad discretion with regard to disciplinary matters. The Tribunal notes that the Secretary-General had yet another opportunity to review the case when the report of the JDC was made available. The gravamen of the Applicant's complaint is that the Respondent's attitude and conclusion are based on unjustified inferences. The Tribunal finds nothing on record to uphold this contention of the Applicant. The interpretation given by the Respondent to the disclosed facts would seem sound, especially as the Tribunal has concluded that no prejudice or discrimination has been established. Indeed, the Applicant has not given any reasons for assuming that bias, discrimination or other extraneous factors might have influenced the Respondent's decision to summarily dismiss the Applicant for serious misconduct.

XIV. The Applicant considers that the punishment imposed on him was disproportionate to his offence, if any. In the exercise of his discretionary power in this respect, the Secretary-General apparently decided that the activities of the Applicant were sufficiently objectionable to warrant summary and immediate dismissal; presumably this was the reason why the JDC was not invoked. Whatever might have been the arguments, all these matters are essentially within the discretionary power of the Secretary-General. Furthermore, the Tribunal finds that there have been no unusual delays at any stage in the handling of this case.

XV. It was within the Secretary-General's power to conclude that because the Applicant, who had been with the UN for 17 years and was holding a post requiring a high degree of responsible conduct, was using his UN position, connections and facilities to further his private and, presumably, financial interests, prompt action was necessary.

XVI. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

New York, 20 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary